

This case arose out of the same facts as those in the case of **Richard C. Canada and wife Sharon Canada v. Ace Codent, et al.**, C/A No. 03A01-9606-CV-00182. The procedural history of the two cases is also identical. In this case, as in the **Canada** case, the appellant, plaintiff below, argues that its amended complaint against Acecodent Incorporated was filed within the applicable statute of limitations under the relation back provisions of Rule 15.03, Tenn. R. Civ. P., as amended effective July 1, 1995. Also, as in the **Canada** case, the appellee has filed a motion to dismiss the appeal predicated on the failure of the appellant to serve a copy of its notice of appeal on the clerk of this court as required by Rule 5(a), T.R.A.P.

We have this day filed a formal opinion in the **Canada** case. Our findings, holdings, and rulings in that case with respect to the issue raised by the motion to dismiss the appeal apply with equal force to the instant case. Accordingly, we conclude that this appeal must be dismissed because of the failure of the appellant to fully comply with the provisions of Rule 5(a), T.R.A.P.

As we did in the **Canada** case, we opt to go further and examine the substantive issue raised by the appellant, Jenkins Dental Arts, Inc.

The parties to this appeal treated the instant case as if it was identical to the **Canada** case. It is not. There is one major, critical difference between the cases.

Canada was a personal injury case, governed by the one-year statute of limitations applicable to such actions, e.g. T.C.A. § 28-3-104. The case before us on this appeal is clearly not a personal injury case subject to the one-year statute of limitations. The corporate plaintiff in the instant action seeks to recover business losses allegedly suffered by it as a result of alleged breaches of express warranty and the implied warranties of merchantability and fitness for a particular purpose. It also alleges negligence and strict liability. It claims that its losses are due to a defective product manufactured by Acecodent Incorporated.

In this case, Acecodent Incorporated was brought into this action when the amended complaint was filed on September 13, 1995. That complaint was timely filed as to most, if not all, of the causes of action set forth in that pleading, without regard to Rule 15.03, T.R.A.P. Simply stated, reliance on that Rule is not necessary to overcome the defendant's motion to dismiss based on the statute of limitations. It is totally irrelevant when, as here, a complaint is filed within the applicable statute of limitations.

The trial judge erred when he dismissed the plaintiff's complaint based on the statute of limitations. Clearly this was not his fault. When the motion to dismiss was argued before him, both parties erroneously treated the instant case as if it was subject to the one-year statute of limitations.

Were this appeal properly before us, we would hold, under Rule 36, T.R.A.P., that the judgment of the trial court in this case is erroneous, vacate same, and remand this case for further proceedings. However, in view of our decision as to the Rule 5(a) issue, we must dismiss this appeal.

The appeal in this case is hereby dismissed. Costs of the appeal are taxed to the appellant. This case is remanded for the collection of costs assessed below, pursuant to applicable law.

Charles D. Susano, Jr., J.

CONCUR:

Houston M. Goddard, J.

Don T. McMurray, J.